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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 851

UNITED STATES OF AMERICA, PETITIONER

v.

DAISY L. CUNNINGHAM, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

QUESTIONS PRESENTED

Since this case was not referred to commissioners "solely because of the 'complexity of the matters to be considered on the question of valuation,' " as the government asserts, Question 1 should properly be stated substantially as follows:

> 1. Whether the District Court abused its discretion under Rule 71A(h) in referring this particular case to commissioners.

Since it is not accurate to say that the commissioners "did not rule upon the admissibility of the evidence" and did not make any findings as to the relative importance and

value "of the various constituent elements upon which they based their ultimate determination of the fair market value of the property condemned," Question 2 should properly be stated as follows:

> 2. Whether the supplemental report of the commissioners complied with the mandate of the Court of Appeals and the instructions of the District Court and contained findings sufficient to make its determination not clearly erroneous.

REASONS WHY PETITION SHOULD BE DENIED

1. On page 6 of the Petition, the government purports to summarize the holding of the Court of Appeals on the issue of appointment of commissioners which is the primary ground for review urged upon this Court. The Statement asserts that the Fourth Circuit based its affirmance of the appointment of commissioners solely upon "complexity of the matters to be considered on the question of valuation." The same impression is left in the Questions Presented (p. 2 of government's Petition). The same statement is made again on pages 9, 10, 11, 13 and 14 of the argument in the government's Petition. Even a cursory reading of the opinion of the Court of Appeals (Appendix B to government's Petition) reveals this is simply not an accurate statement. In fact, the words "complexity of the matters to be considered" were used in a portion of the opinion relating to another and separate question on that appeal rather than the question of the appointment of commissioners, which the Court had already finished discussing.

On the specific question of whether the District Court had committed error in appointing commissioners, the

Court of Appeals for the Fourth Circuit clearly stated numerous and ample grounds for appointment. The opinion was written by Chief Judge John J. Parker, who served as Chairman of the Committee to Consider the Method of Determining Just Compensation in Condemnation Proceedings, whose Report was adopted by the Judicial Conference of the United States, March 1952, which is the very Report quoted approvingly by the government on page 11 of its Petition in this case. On the question of appointment of commissioners, the opinion stated (246 F. 2d 330; Appendix B of Petition):

> "The court found that, because of the character, location and quantity of the property, the contention as to the presence and value of minerals, the distance of the property from the nearest place where the court could sit, the importance of having the land viewed by those who were to value it and the convenience of parties and witnesses, it was in the interest of justice that the issues of compensation be determined by a commission of three persons rather than by a jury, and proceeded to appoint such commission, laying down in an order the principles which were to be observed by them in the discharge of their duties. . . .
>
> "We think that there can be no question but that the District Judge was acting well within the limits of the discretion reposed in him by Rule 71A(h) in appointing the commission in this case and that no abuse of the discretion is shown. The pertinent portion of that rule provides: . . .
>
> "It is true that the rule prescribes 'trial by jury as the usual and customary procedure to be

followed, if demanded, * * * and as authorizing reference to commissioners only in cases wherein the judge, in the exercise of a sound discretion based upon reasons appearing in the case, finds that the interests of justice so require.' Report Judicial Conference of United States March 1952, pp. 8 and 9. The trial judge found here that the interests of justice required the appointment of the commission and this finding was made upon reasons appearing in the case and set forth in his order of appointment. *There can be no question but that they were adequate. The quantity of the land, its availability for beach residential development, the elements of value presented by its availability for hunting and sport fishing, the question as to whether the discovery of ilmenite added to its value, the importance of its being carefully gone over by those who were to value it and the impracticablity of having a jury do this in view of its distance from the place where the nearest federal court was held, — all these things taken together certainly justified the appointment of a commission, which would not only serve the convenience of parties and witnesses and make a personal examination of the premises,* but which, composed as it was of a distinguished lawyer and two experienced real estate dealers, would bring to the difficult questions of valuation presented an expertness which could not be expected of a jury. Certainly the appointment of the commission could not be held an abuse of discretion. . . ." (Emphasis added)

It is manifest that the Court of Appeals had its eyes wide open and based its affirmance upon proper grounds.

including the quantity of land (1858 acres); its diverse characteristics and adaptability of the various parts for different uses (beach residential development, commercial fishing facilities, commercial and sport boat basins, hunting and recreational preserve, mining of ilmenite ore); the distance from where the nearest Federal Court sat (70 miles); the importance of having the land viewed and carefully examined by those who were to value it (the commissioners examined the property on numerous occasions from the sea by boat, from the air by helicopter, and from the land by jeep and on foot, riding and walking over the peninsula four miles long and one mile wide, which was especially important since the height and topography of the land was a crucial disputed issue—all of which would have been impractical for a jury); the convenience and expense of the parties and witnesses (most of whom were local persons who would have to travel 70 or more miles to the nearest seat of the Federal Court at Elizabeth City, whereas they lived and worked within a few miles of the Manteo, N. C., Courthouse where the commissioners sat); and the location of the land (situated on the Outer Banks of North Carolina, remote from the rest of the State accessible only by private motor vehicle and infrequently scheduled motor buses).

To specifically illustrate one of the grounds, convenience of the parties and witnesses, witnesses Earl Mann, W. M. Hedrick, Dal H. Williams, E. E. Meekins, A. W. Drinkwater, Claude C. Duval, Ezekial M. Midgette, A. S. Austin, Jr., L. J. Styron, Nikoli Miller, for the landowners, and Charles A. Marshall, Jesse H. Denniston, Harry C. Lawrence, Pennell A. Tillett, Captain T. J. Harris, for the government, (the majority of the witnesses in the case) resided in the vicinity of the Worth tract which was within only a few miles from Manteo, North Carolina, where the hearings were conducted, but 70 miles from the site of the

nearest Federal Court. "The interest of justice" was also served by the type and location of the hearing since it directly affected the fairness and completeness of the trial of the issue of the fair market value of the property.

Indeed, the government, while it tries in one breath to attack the position of the Court of Appeals for the Fourth Circuit in its decision on the first appeal, in the next breath quotes with glowing approval the position taken by the same Court in the same opinion toward Rule 71A(h) and its application (p. 11 of the Petition).

2. It is also very pertinent in the consideration of this Petition what action the District Court took on the appointment of commissioners since that is actually the Order in which was exercised the Court's discretion to refer the case to commissioners. That Order entered by the District Judge on August 19, 1954, made extensive findings of fact supporting its determination that "because of the character, location, and quantity of the property . . . and because of other reasons set forth in these findings, the Court, in the exercise of its discretion, determines that it is in the interest of justice that the issues of compensation shall be determined by a commission of three persons to be appointed by the Court." It is respectfully submitted that the reading of this Order alone will be sufficient to prompt a speedy denial of the Petition. It is set forth in the Appendix to this Brief. Indeed, the circumstances of the location, size, and character of this property as set forth in the Order appointing commissioners are tailor-made to fit the pattern of Rule 71A(h). Although the Rule states the three grounds in the disjunctive, there were ample evidence and findings here of all three. Whatever may be true of the many other cases the Department of Justice complains of which have been referred to commissioners, it cannot be fairly denied that the case at bar (which is the only one involved in this

Petition) is unusual and extraordinary and that justice and a fair determination of just compensation was promoted by its reference to commissioners by the District Judge. As Judge Parker stated, it was "well within the limits of the discretion reposed in him by Rule 71A(h)," and "there can be no question but that [the reasons] were adequate." The government's Petition overlooks that Rule 71A(h), as presently worded, places the reference in the discretion of the District Court;[1] but it is fair to say that, far from establishing an abuse of discretion, the many reasons and circumstances concerning this property make this case one in which it is difficult to conceive of the judge below or any District Judge acting otherwise.

3. The fact that a number of Federal condemnation cases have been referred to Commissioners is certainly no ground for granting certiorari in this case. Statistics concerning the number of times condemnation cases have been referred to Commissioners around the nation, without regard to the circumstances of each case, can hardly enlighten the Court on the sole question before it here — whether the court below on the facts of this case may have committed error on such a serious and far-reaching question of Federal law or whether it "has so far departed from the accepted and usual course of judicial proceedings" as to warrant review. If anything, the government's contention

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[1] *U. S. v. Chamberlain Wholesale Grocery Co.*, 226 F. 2d 492 (C. A. 8, 1955) from which the government applied for review of the question whether Rule 71A(h) authorizes a reference to Commissioners in the absence of exceptional or extraordinary circumstances, the opinion stated that the drafters "intended a broad discretion to be vested in the District Court to choose between the use of juries or of Commissioners in the condemnation cases"; the Supreme Court denied certiorari, 350 U. S. 989.

is a problem in the administration and business of the Federal courts, and the Department of Justice should not try to herd this case into the sacrificial fold with others which have no relation or similarity to it.[2] If the government is dissatisfied with Rule 71A(h), it should proceed in proper and ordinary channels to try to get the Rule changed. Virtually everything said in its Petition is a quarrel with the commission provision of Rule 71A(h), at which the government has been sniping for some years; this does not constitute a showing of any error of the courts below in applying the existing Rule 71A(h) to this action. If, as appears likely, the government is merely using the Petition in this case and the *Hall* case as a means of gaining the ear of the Court on the need for amendment to Rule 71A(h), then it should be treated for what it is and, after being thoughtfully read, promptly denied.

4. It should be noted that question of reference to commissioners was before the Court of Appeals in the first appeal of this case and not in the decision from which review by certiorari is sought. On this prior appeal the Court affirmed the action of the District Court in referring the case to commissioners. In fact, the Fourth Circuit itself specifically re-referred the matter to these commissioners for detailed findings. While it is true that final judgment had not been entered in the case as a whole, yet, as to this action of the Court in appointing commissioners, which is the chief ground for this application for certiorari, the Order was made final on the prior appeal. It was impossible for the government to raise this question again in the district court; that Order was therefore final, and extensive further

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[2]This is the very sort of treatment the government itself complains about in the Petition for Certiorari in the case of *U. S. v. Hall*, decided by the Ninth Circuit on January 9, 1960.

proceedings were to follow in its wake. Supreme Court Rule 20 recognizes the existence of occasions for review on certiorari prior to entry of final judgment. Yet, from the first and final decision of the Court of Appeals on this point, the government did not seek certiorari. Pursuant to the Mandate of the Court of Appeals, the case went back to the commission for detailed findings. which were made in a supplemental report, and then the award and supplemental report were reviewed by a District Judge, from whose action the defendant property owners took appeal. This second decision of the Court of Appeals did not deal with the question of reference to commissioners at all because the determination of that point had already become final.

The case of *U. S. v. Hall*, in which a Petition for Writ of Certiorari was filed simultaneously with this one, stands in an entirely different posture. That Petition seeks review of a judgment of the Court of Appeals for the Ninth Circuit denying a Writ of Mandamus by which the government sought to require respondent, the Chief Judge of the United States District Court for the Southern District of California, to vacate a number of orders by which he referred many pending Federal condemnation cases to commissioners. The government no doubt followed that procedure in order to try to pave the way for review of that point. In fact, its Petition in the *Hall* case admits the weakness of the government's position in the case at bar, stating "Mandamus clearly was an appropriate remedy to vindicate that right [to a jury trial] . . . Indeed, an extraordinary writ may be the only way in which the United States can obtain effective appellate review of this important issue." (p. 23).

This case is not in any way related or comparable to the *Hall* case, in which the District Judge on his own motion and on the basis of virtually the same findings in each

case referred 21 separate condemnation cases involving 300 parcels of land for four different Federal projects for reasons which included consideration of the dockets in that district and the time involved. The grounds for reference by the court below were entirely different and unrelated, as are the facts of the two cases.

5. The government presents a rather strange argument on page 14 of its Petition. After stressing how long (seven years) this case has been in the court and how many times it has been reviewed by the District Courts and the Court of Appeals, the Petition ends up by asking this Court to reverse the case, throw out everything that has been done, and start all over again where the case was in 1953. It then puts itself in the position of asking that the case be placed on the civil trial docket of the Eastern District of North Carolina, now over two years behind. The trial of this case before commissioners consumed four weeks and would probably take longer before a jury, with the consequent enormous expense to taxpayers and litigants (both of whom used numerous expert witnesses from all over the United States in the trial below). From the outcome of the trial, an appeal to the Court of Appeals would be likely; and if error in the trial was found, a new trial would be necessary with furthet delay on the crowded dockets for several more years entailing further time and expense before the case could be finally ended.

In short, the government, after complaining of the seven years this case has taken (most of which time was consumed on *government* motions, appeals, requests for extensions of time and for continuations, petitions for rehearings, etc.), asks this Court to take action which would inevitably mean many more years of court proceedings and postponement of the conclusion of a case which already seems almost interminable. If ever there was a case for

the exercise of what the government in its Petition in the *Hall* case concedes to be the "natural 'reluctance to cause further delay and expense and to set at naught the . . . years of work devoted by the District Court and the Commission to [the] case' " (p. 23), surely it is the case at bar.

Respondents earnestly urge that the Record in this case establishes that it has had ample and competent review, and should now be brought to conclusion once and for all by this Court in order that the owners may finally have the unrestricted use of their just compensation, and the government be relieved of further and unnecessary expense.

6. The Court of Appeals in the decision below (Appendix A to the Petition) amply and properly answered the government's complaint (reason 3 of Petition) about failure of the Report to place separate monetary valuations on various geographic locations within the single undivided Tract 12. In describing the diverse topography of Tract 12 and the highest uses to which different portions of it were adaptable, the Commission discussed four geographic areas within the single undeveloped tract, but this was only for descriptive purposes and for convenience of reference.

No decision of this or any other court has ever announced a requirement that in valuing a single undeveloped tract with diverse characteristics the Commission or Judge must attach a separate specific monetary value to each different part, the total of which is the fair market value of the tract to be valued. In fact, there is serious question as to whether such a method might not contravene the established principles of valuation which require the tract to be valued as a single entity. That question does not have to be decided here, because whatever other method of determining the valuation could have been followed, and might have

been proper had it been followed, the salient fact is that this Commission chose to appraise the tract as a whole, just as if it were bought and sold in the actual market on June 25, 1953, as one 1858-acre tract, for one amount of money. Having made specific findings to inform the Court exactly what basic facts it took into consideration, what, if any, weight was given to the various parts of the evidence, and what principles of law were applied, the Commission proceeded to find, based on all this, the fair market value of each of the two tracts on June 25, 1953. Surely, it cannot be said as a matter of law that such a report is clearly erroneous.

The Court of Appeals, having sent the case back in the first instance to the Commission for detailed findings, was in the best position to know whether its directions had been complied with; and it determined on the second appeal that they had been fully met. It held that "We can hardly say the commissioners failed to follow their instructions, however, when they did what they were told to do by this Court and by the District Court. In resubmitting the case, the District Court instructed the commissioners to find a single value for Tract 12 as a whole." The Fourth Circuit on the prior appeal held:

> "This testimony was admissible as bearing on the question of valuation, even though it was required that the property be valued as a whole. Cade v. United States, 4 Cir., 213 F. 2d 138. It would not be proper, however, to attempt to arrive at value by adding these elements of value together. Morton Butler Timber Co. v. United States, 6 Cir., 91 F. 2d 884; United States v. Certain Parcels of Land, 5 Cir., 149 F. 2d 81."

Moreover, the Fourth Circuit on the second appeal stated: "Furthermore, the absence of separate valuations

is no undue hinderance to judicial review, for, as will presently appear, the reason for the differences between the findings of the commissioners and those of the District Judge is clear." (p. 23, Appendix A of the Petition).

7. The objection of the government concerning rulings on the evidence by the Commission is squarely answered in the decisions of the Fourth Circuit on both the first and second appeals. The detailed supplemental report of the Commission plainly shows its straightforward and realistic disposition of all disputed points of evidence to which objection was interposed (pp. 29-43 of printed Joint Appendix in *Cunningham v. United States*, C. A. No. 7817, Vol. II of Record).

CONCLUSION

The Petition falls far short of establishing why certiorari should be granted in this case, which is not by any means a "class action" for all condemnation cases referred to commissioners, but is manifestly one case, whether there be any others or not, in which reference to commissioners was appropriate.

Respectfully submitted,

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF NORTH
CAROLINA

ELIZABETH CITY DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. SOUTHERLY PORTION OF BODIE ISLAND, NAGS HEAD TOWNSHIP, DARE COUNTY, STATE OF NORTH CAROLINA, AND W. A. WORTH, ET AL, AND UNKNOWN OTHERS, Defendants.	CIVIL ACTION NO. 262 TRACT NO. 12 ORDER

THIS CAUSE Coming on to be heard and being heard on the 19th day of August, 1954, before His Honor, Don Gilliam, United States District Judge for the Eastern District of North Carolina, at Raleigh in said District, on the Motion of W. A. Worth and wife, Ethel E. Worth, and

Oregon Inlet, Inc., for the appointment of Commissioners to determine the issue of compensation pursuant to Rule 71A(h) of the Rules of Civil Procedure, and upon consideration of said Motion, the evidence, and argument of counsel, the Court finds:

I.

That the lands of the movants sought to be condemned in this action comprise more than 1800 acres, the movants contending that the exact acreage is 1857.98 acres, situate in Dare County, North Carolina, and bounded on one side by the Atlantic Ocean and on another side by Roanoke Sound. Located on said land are artifically constructed duck ponds embracing about 300 acres connected with the Sound by a canal, so constructed that the depth of the water in the ponds is controlled by flood gates. The said duck ponds have been used and the movants will contend that they have been and are useful and valuable as hunting areas for wild fowl. At and near Oregon Inlet on said lands, there is located an artificially constructed boat basin providing space for the docking of small boats used for pleasure and by commercial and non-commercial fishermen and hunters. Near said boat basin, there is located a store and storerooms, and gasoline filling stations, all of which were leased, at the time of the institution of this action, to Oregon Inlet, Inc., which was engaged in the conduct and operation of a mercantile business, gasoline filling stations, and the sale of services and supplies for non-commercial fishing and hunting. The movants will contend that the petitioner took possession of the premises occupied by Oregon Inlet, Inc., thereby forcing it to dispose of its stock of merchandise and equipment at a substantial financial loss for which they are entitled to compensation. Located on said lands is a large residence which has been used and is useful as a summer cottage and also a lodge for hunters and fishermen.

to which access is had by water and by overland road connecting with the State Highway running through the movants' lands. The movants' land has a frontage on the Atlantic Ocean of approximately three miles and a hard surface State Highway extends through said lands generally parallelling the ocean frontage so that the land between the ocean and said highway varies in depth from approximately 1000 feet to approximately 1500 feet. The movants contend that much of said land lying between the Atlantic Ocean and said State Highway, as well as much of it lying west of said highway, is suitable for residential and business purposes, the lots varying in size and value, and, in determining the compensation to be paid for said lands, it is necessary that evidence be offered with respect to the topography of said land and the determination of what parts thereof are so located as to be available for residential and other beach resort purposes. That all of said lands high enough above the water to be available and suitable for beach resort purposes is not contiguous but separated by water and other natural conditions into several areas. All of the movants' land is located to the south of the beach resort commonly known as Nags Head and in such proximity that evidence of the value of the movants' land will be offered to show its adaptability and usefulness for beach resort purposes and its subdivision, development, and marketability for such purposes.

II.

The movants claim that their lands contain a valuable mineral known as ilmenite and that it is present in commercial quantities; that it will be necessary for them to use expert witnesses to testify as to the presence of said mineral in commercial quantities and to other facts with respect to practical and economical mining of said mineral and other scientific facts affecting the extent to which

the presence of said mineral affects the value of the movants' lands, and it is expensive to secure the attendance of such witnesses, which expense will be greatly increased by requiring their attendance upon a jury trial at Elizabeth City.

III.

The movants also contend that over a long period of years, by the operation of the tides and winds, they have acquired substantial acreage of land at the southern end of their lands bordering on Oregon Inlet and that said process of accretion is continuing to operate and is a factor to be considered in determining the compensation to which they will be entitled, and such facts must be shown by witnesses who live in the immediate area and can testify of their own knowledge and observation.

IV.

The Court finds that the lands of the movants are located approximately 70 miles from Elizabeth City, [redacted] quotank County, North Carolina, where the Court customarily sits and would sit for the trial of this action; that there is no means of public transportation between said Elizabeth City and said lands except by private motor vehicles and infrequent schedules of motor buses; that in the trial of the issue of just compensation in this case, many of the witnesses, other than the experts previously referred to, will be residents of the general locality of movants' lands and that to require the attendance of such witnesses upon the Court sitting at Elizabeth City would be both inconvenient and expensive to them and to the parties, whereas if Commissioners are appointed they can conduct their hearings in the vicinity of said lands and thereby greatly promote the convenience of many witnesses.

V.

Because of the location of said lands, the size of the area involved, and the varying topography, and the contentions that said lands are useful for the many different purposes heretofore enumerated, the Court concludes that it may be reasonably anticipated that a view of said lands should be had by a jury or commissioners and in such event it would be necessary for the jury or commissioners to visit parts of said land by motor vehicle and parts by water transportation, and, manifestly, it will be easier, more practical and less expensive for three commissioners to view said lands than for a jury to do so.

VI.

The Court further finds that from the representations made by the petitioners and the respondents, the trial of the issue of just compensation will consume several days time for the reception of the testimony of witnesses and other evidence to be offered by the parties, and the Court concludes that the taking of said testimony and evidence by commissioners on the premises and at nearby points will not only be convenient to the parties, their witnesses, and their counsel, but will result in reducing the costs of the hearing as well as the time consumed, and will expedite the final determination of the issues involved.

VII.

Because of the character, location, and quantity of the property of the respondents sought to be condemned in this case, and because of the other reasons set forth in these findings, the Court, in the exercise of its discretion, determines that it is in the interest of justice that the issues of compensation shall be determined by a Commission of three persons to be appointed by the Court.

IT IS, THEREFORE, CONSIDERED, ORDERED, AND ADJUDGED That the issues of compensation to be paid by the petitioner to the movants, W. A. Worth and wife, Ethel E. Worth, and Oregon Inlet, Inc., shall be determined by a Commission of three persons to be appointed by the Court by Order to be entered herein.

Entered at Raleigh, North Carolina, this the 19th day of August, 1954.

(s) Don Gilliam

United States District Judge